ARC 5295C

PUBLIC SAFETY DEPARTMENT[661]

Notice of Intended Action

Proposing rule making related to breath testing and standards for drug detection and providing an opportunity for public comment

The Public Safety Department hereby proposes to amend Chapter 157, "Devices and Methods to Test Body Fluids for Alcohol or Drugs," Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code section 321J.2.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code section 321J.2.

Purpose and Summary

These proposed amendments to Chapter 157 modify the frequency with which evidentiary breath test devices must be certified. This amendment is made to ensure a balance between the Division of Criminal Investigation laboratory staff resources and confirmation of accurate devices.

Additionally, the Department proposes amendments to controlled substance screening levels to allow for alternatives to immunoassay screening and to keep testing in line with the federal standards. The current language in the rule does not reference the correct and updated federal registry and associated wording for initial screening for certain drugs or categories of drugs and their metabolites. In short, the Department is amending the rule to match the content in the current federal registry. The impact to the testing laboratory and stakeholders is that the revised federal registry allows for alternate technologies to immunoassay screening for drugs. The Department's laboratory is working on validation of one of those alternate technologies, which provides more specificity in the screening process. The Department cannot start using that technology for casework until the proposed amendments to the rule are adopted and become effective. Forensic toxicology laboratories are more often moving to alternate technologies to immunoassay screening. Immunoassay screening can be less specific and typically relies on proprietary test kits. If the vendor has a supply or quality issue, the turnaround time for the initial screening result can be greatly impacted.

Finally, the American National Standards Institute-accredited American Academy of Forensic Science Standards Board, with the support of the National Highway Traffic and Safety Administration, is in the process of approving testing parameters for drug testing tailored for impaired driving, and the Department anticipates additional rule making at that time.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Pursuant to the provisions of rule 661—10.222(17A), the Department does not have authority to waive requirements established by statute. Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Department for a waiver of the discretionary provisions, if any, pursuant to the provisions of rule 661—10.222(17A).

Public Comment

Pursuant to the provisions of rule 661—10.222(17A), the Department does not have authority to waive requirements established by statute. Any interested person may submit written or oral comments concerning this proposed rule making. Written or oral comments in response to this rule making must be received by the Department no later than 4:30 p.m. on December 22, 2020. Comments should be directed to:

Sarah Jennings
Department of Public Safety
Oran Pape State Office Building
215 East 7th Street
Des Moines, Iowa 50319
Phone: 515.725.6185
Email: jennings@dps.state.ia.us

Public Hearing

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)"b," an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its regular monthly meeting or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend subrule 157.2(2) as follows:

157.2(2) A peace officer desiring to perform testing of a subject's breath for the purpose of determining the alcohol concentration shall employ, or cause to be used, a breath testing device of a type meeting the minimum performance requirements established in Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol, Federal Register, Volume 58, No. 179 (September 17, 1993), pp. 48705-48708. All devices so used must be certified to be in proper working order ~~within a period of one year immediately preceding use~~ at least once per calendar year according to procedures specified for that device. The interval between certifications shall not be more than 450 days.

ITEM 2. Amend subrule 157.5(2) as follows:

157.5(2) Any peace officer using an approved device shall follow the instructions furnished by the manufacturer for use of such a device. The calibration of each unit shall be checked at least once per month, and the device shall be calibrated, if necessary, using a dry gas standard. The officer or officer's department shall maintain a record of each calibration. This record shall include:

a. The identity of the ~~officer~~ person performing the calibration.
b. The date.
c. The value ~~and type~~ of standard used.
d. The unit type and identification number.
e. The expiration date of the standard used.

ITEM 3. Amend rule 661—157.7(321J) as follows:

661—157.7(321J) Detection of drugs other than alcohol.

157.7(1) *Adoption of federal standards.* Initial test requirements based upon standards adopted by the federal Substance Abuse and Health Services Administration in "Mandatory Guidelines for Federal Workplace Drug Testing Programs," ~~73 FR 71858~~ 82 FR 7920, and displayed in the following table are hereby adopted as standards for determining detectable levels of controlled substances in the division of criminal investigation criminalistics laboratory initial screening for controlled substances detected by the presence of the following: marijuana metabolites, cocaine metabolites, ~~opiate metabolites, acetylmorphine, phencyclidine, and amphetamines~~ hydrocodone/hydromorphone, oxycodone/oxymorphone, 6-acetylmorphine, phencyclidine, amphetamine/methamphetamine, and MDMA/MDA. The following table shows the minimum levels of these substances which will result in a finding that a controlled substance is present at a detectable level:

~~Substance~~ Initial test analyte	~~Minimum Level (ng/ml)~~ Initial test cutoff[1]
Marijuana metabolites (THCA)[2]	50 ng/ml[3]
Cocaine metabolites (Benzoylecgonine)	150 ng/ml[3]
~~Opiate metabolites – codeine/morphine~~ Codeine/Morphine	2000 ng/ml
~~Acetylmorphine~~ Hydrocodone/Hydromorphone	~~10~~ 300 ng/ml
~~Phencyclidine~~ Oxycodone/Oxymorphone	~~25~~ 100 ng/ml
~~Amphetamines[2] – (amphetamine, methamphetamine, and – methylenedioxymethamphetamine)~~ 6-Acetylmorphine	~~500~~ 10 ng/ml
Phencyclidine	25 ng/ml
Amphetamine/Methamphetamine	500 ng/ml
MDMA[4]/MDA[5]	500 ng/ml

[1] ~~"ng/ml" means "nanograms per milliliter."~~ For grouped analytes (i.e., two or more analytes that are in the same drug class and have the same initial test cutoff):
Immunoassay: The test must be calibrated with one analyte from the group identified as the target analyte. The cross-reactivity of the immunoassay to the other analyte(s) within the group must be 80 percent or greater; if not, separate immunoassays must be used for the analytes within the group.
Alternate technology: Either one analyte or all analytes from the group must be used for calibration, depending on the technology. At least one analyte within the group must have a concentration equal to or greater than the initial test cutoff or, alternatively, the sum of the analytes present (i.e., equal to or greater than the laboratory's validated limit of quantification) must be equal to or greater than the initial test cutoff.

[2] ~~Either a single initial test kit or multiple initial test kits may be used provided that the single test kit detects each target analyte independently at the specified cutoff.~~ An immunoassay must be calibrated with the target analyte, D-9-tetrahydrocannabinol-9-carboxylic acid (THCA).

[3] *Alternate technology* (THCA and benzoylecgonine): The confirmatory test cutoff must be used for an alternate technology initial test that is specific for the target analyte (i.e., 15 ng/mL for THCA, 100 ng/mL for benzoylecgonine).

[4] Methylenedioxymethamphetamine (MDMA).

[5] Methylenedioxyamphetamine (MDA).

157.7(2) Reserved.